Source: http://scc.lexum.umontreal.ca/en/2003/2003scc25/2003scc25.html

KP Pacific Holdings Ltd. *v.* Guardian Insurance Co. of Canada, [2003] 1 S.C.R. 433, 2003 SCC 25

KP Pacific Holdings Ltd. *Appellant*

v.

Guardian Insurance Company of Canada, Canadian Northern Shield Insurance Company, AXA Pacific Insurance, General Accident Insurance Company of Canada and Sovereign General Insurance Co. *Respondents*

Indexed as: KP Pacific Holdings Ltd. *v.* Guardian Insurance Co. of Canada

Neutral citation: 2003 SCC 25.

File No.: 28815.

2003: February 18; 2003: May 1.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for british columbia

Insurance — All-risks policy — Limitation period — Insured claiming for fire damage under all-risks policy — Part 5 (Fire Provisions) of British Columbia Insurance Act providing shorter limitation period than Part 2 (General Provisions) — Which part of Insurance Act, and by extension, which limitation period applicable? — Insurance Act, R.S.B.C. 1996, c. 226, Part 2, Part 5, s. 119.

The insured claimed for loss by fire under its all-risks insurance policy. The claim was made more than one year after the loss occurred but within one year of filing proof of loss. The insurer took the position that the claim could not proceed on the ground that the applicable limitation period is one year from the date of the loss, according to Part 5 — the Fire Insurance Part — of the B.C. *Insurance Act*. At trial, the insured contended that its all-risks policy fell instead under the general provisions of Part 2, where the limitation period is one year from filing proof of loss. The trial judge held that the policy fell within Part 5 of the Act and dismissed the insured's claim. The Court of Appeal upheld the judgment.

Held: The appeal should be allowed. The limitation period in Part 2 is applicable and the insured's claim is not statute-barred.

Neither the language of s. 119 in Part 5 nor the history of that provision supported the conclusion that the Legislature intended a multi-risk policy to fall within Part 5. Such policies cannot be shoehorned into that Part without contrived reconstruction and anomalous consequences. Section 119, despite its alterations, is based on the outmoded paradigm of discrete categories of insurance policies and is incapable of coherently addressing the modern multi-peril policy. Since the insured's policy does not fit into a specific category, it is governed by Part 2. Part 2, however, does not represent an ideal solution for multi-risk comprehensive policies and it would be highly salutary for the Legislature to amend the Act and to provide specifically for such policies. The fact that the contract of insurance specifies a limitation period of one year from loss did not oust the longer limitation period in Part 2 because s. 3(a) of the Act does not permit the insurer to substitute contractually harsher terms than those provided in Part 2.

Cases Cited

Referred to: *Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.* (1991), 57 B.C.L.R. (2d) 198; *Churchland v. Gore Mutual Insurance Co.* (2001), 92 B.C.L.R. (3d) 1, 2001 BCCA 470.

Statutes and Regulations Cited

Insurance Act, R.S.B.C. 1996, c. 226, ss. 3(a), 119, statutory condition 14.

Insurance Act, S.B.C. 1925, c. 20, s. 2 "fire insurance".

Insurance Act Amendment Act, 1935, S.B.C. 1935, c. 38, s. 2 "fire insurance".

Insurance Act Amendment Act, 1938, S.B.C. 1938, c. 24, s. 3.

Insurance Act Amendment Act, 1957, S.B.C. 1957, c. 31, s. 7.

Insurance Classes Regulation, B.C. Reg. 337/90, s. 2 "fire insurance".

Authors Cited

Brown, Craig, and Julio Menezes. *Insurance Law in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1991.

Rendall, James A. Annotation to *Briggs v. B.C.A.A. Insurance Co.* (1990), 40 C.C.L.I. 282.

Rendall, James A. "Case Comment: *Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.*: A Revisitation" (1995), 28 C.C.L.I. (2d) 220.

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 202 D.L.R. (4th) 235, 92 B.C.L.R. (3d) 26, 156 B.C.A.C. 58, [2001] I.L.R. ¶I-4009, [2001] B.C.J. No. 1517 (QL), 2001 BCCA 469, supplementary reasons (2002), 210 D.L.R. (4th) 562, 99 B.C.L.R. (3d) 195, 165 B.C.A.C. 247, [2002] B.C.J. No. 509 (QL), 2002 BCCA 176, affirming a decision of the British Columbia Supreme Court (2000), 18 C.C.L.I. (3d) 196, [2000] I.L.R. ¶I-3839, [2000] B.C.J. No. 833 (QL), 2000 BCSC 673. Appeal allowed.

Michael G. Armstrong and *Janet E. Currie*, for the appellant.

Donald W. Yule, Q.C., and *Alex Sayn-Wittgenstein*, for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 The appellant owned a hotel. On June 6, 1997, the hotel was damaged by fire. The appellant made a claim for the loss under its insurance policy. The insurer took the position that the claim had not been brought within the applicable limitation period. The British Columbia Supreme Court dismissed the appellant's action: (2000), 18 C.C.L.I. (3d) 196, 2000 BCSC 673. The Court of Appeal upheld this decision: (2001), 92 B.C.L.R. (3d) 26, 2001 BCCA 469, supplementary reasons (2002), 99 B.C.L.R. (3d) 195, 2002 BCCA 176. The litigants now find themselves seeking final resolution before the Supreme Court of Canada.

2 The source of all the confusion, and the consequent delay and expense, is the British Columbia *Insurance Act*, R.S.B.C. 1996, c. 226. It is unclear. The insurer argues that the applicable limitation period is one year from the date of the loss, according to statutory condition 14 of Part 5, the Fire Insurance Part. The insured, by contrast, argues that this all-risks policy does not fit under Part 5, and falls instead under the general provisions of Part 2, where the limitation period is one year from filing proof of loss. On the first reading, the appellant's claim is out of time. On the second, it may proceed.

3 The *Insurance Act* was passed in 1925 (S.B.C. 1925, c. 20). Despite repeated housekeeping amendments, it remains essentially unchanged. It was designed for a world where insurers issued policies geared to specific risks and subjects, such as fire insurance, theft insurance, business loss insurance, and so on. Accordingly, it lays down rules, including limitation periods, based on different and discrete categories of insurance.

4 Insurance practices, by contrast, have changed. A dominant policy in today's world is the "all-risks" or "multi-peril" policy, which covers a panoply of perils. This is good for consumers. It minimizes the number of policies they need to buy and ensures comprehensive coverage at lower cost. But it is bad when legal issues arise. The outmoded category-based Act contains rules based on the old classes of insurance. The newer comprehensive policies are difficult if not impossible to fit into the old categories. The result is continued uncertainty about what rules apply. Claims stall. Litigation ensues. Courts struggle with tortuous alternative interpretations. The rulings that have emerged have been likened to a "judicial lottery": Professor J. A. Rendall, Annotation to *Briggs v. B.C.A.A. Insurance Co.* (1990), 40 C.C.L.I. 282, at p. 288 (commenting on B.C. case law prior to *Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.* (1991), 57 B.C.L.R. (2d) 198 (C.A.)).

5 It would be highly salutary for the Legislature to revisit these provisions and indicate its intent with respect to all-risks and multi-peril policies. In the meantime, the task of resolving disputes arising from this disjunction between insurance law and practice falls to the courts. Brown and Menezes lament: "Surely there can be little which is less productive, or more wasteful, than litigation about such technicalities": C. Brown and J. Menezes, *Insurance Law in Canada* (2nd ed. 1991), at p. 16. I wholeheartedly agree.

6 The comprehensive policy at issue on this appeal cannot be shoehorned into the Part 5 fire insurance section without contrived reconstruction and anomalous consequences. It simply does not fit. Consequently, it cannot be said that the Legislature intended the Fire Insurance provisions to govern. It follows that comprehensive policies are governed by Part 2, which is of general application. Accordingly, we conclude that the limitation period of one year from filing proof of loss applies, and that the appellant's claim is not statute-barred.

II. Analysis

7 The result in this case depends on whether KP Pacific's policy falls within Part 5 of the *Insurance Act*, governing fire insurance, or within Part 2, the general part. If the policy falls within Part 5, the appellant is out of time. If not, it may pursue its claim. Which Part applies depends on how one reads the Act. To attempt to understand the Act's provisions, one must trace its history.

8 In 1925 British Columbia consolidated a number of laws into the *Insurance Act*. The Act defined fire insurance simply as "insurance against loss of or damage to property in the Province, or in transit therefrom or thereto, caused by fire, lightning, or explosion, [including] sprinkler-leakage insurance": *Insurance Act*, S.B.C. 1925, c. 20, s. 2. In 1935 the definition was amended to add the qualification that the fire insurance must not be "incidental to some other class of insurance defined by or under this Act": *Insurance Act Amendment Act, 1935*, S.B.C. 1935, c. 38, s. 2. Fire insurance was

seen as a discrete class of insurance, dealing exclusively or primarily with loss due to fire. The Fire Insurance Part of the Act accordingly seemed to be confined to strict fire insurance policies.

9 In 1938 the Act was amended to include the possibility that the Fire Insurance Part of the Act could apply to fire insurance policies that also included other risks. This provision, still found in s. 119 of the Act, provides that "[t]his Part applies to insurers carrying on the business of fire insurance and to contracts of fire insurance, whether or not a contract includes insurance against other risks as well as the risks included in the expression 'fire insurance as defined by this Act'": *Insurance Act Amendment Act, 1938*, S.B.C. 1938, c. 24, s. 3 (emphasis added). No other province adopted this particular language. Why British Columbia made this change is unclear. Perhaps it was designed to reflect the fact that fire insurance policies also might cover incidental risks, such as water damage from fire. It seems unlikely that the reason for the amendment was to respond to the multi-peril policy, which was not yet prevalent.

10 In 1957, in concert with other provinces, the Legislature amended the Act to exclude certain contracts of insurance from the Fire Insurance Part, Part 5, namely contracts of theft insurance (now s. 119(a)), loss of profits insurance (now s. 119(b)), and policies "[w]here the peril of fire is an incidental peril to the coverage provided" (now s. 119(c)): *Insurance Act Amendment Act, 1957*, S.B.C. 1957, c. 31, s. 7. Updated by further exclusions, the present s. 119 reads as follows:

> This Part applies to insurers carrying on the business of fire insurance and to contracts of fire insurance, whether or not a contract includes insurance against other risks as well as the risks included in the expression "fire insurance" as defined by this Act, except
>
> (a) contracts of insurance falling within the classes of aircraft, automobile, boiler and machinery, inland transportation, marine, plate glass, sprinkler leakage and theft insurance,
>
> (b) if the subject matter of the contract of insurance is rents, charges or loss of profits,
>
> (c) if the peril of fire is an incidental peril to the coverage provided, or
>
> (d) if the subject matter of the insurance is property that is insured by an insurer or a

> group of insurers primarily as a nuclear risk under a policy covering against loss of or damage to the property resulting from nuclear reaction or nuclear radiation and from other perils.

11 Section 119 maintains a classification approach to the applicability of Part 5. Fire insurance is defined by reference to the regulations, now Regulation 337: *Insurance Classes Regulation*, B.C. Reg. 337/90, s. 2. The 1938 clause introduces the idea that the Part may apply where the policy insures other risks, suggesting that an all-risks policy might fall within this Part. However, the exceptions that follow in s. 119(a) all refer to classes of insurance or incidents of those classes as defined in Regulation 337. The result is a section that defines the contents of Part 5 on the basis of a definition of fire insurance as a narrow discrete class, tantalizingly amplifies it to include other risks, and then ratchets it back by a series of class-based exclusions.

12 How, if at all, does an all-risks policy penetrate the tangled historical thicket that guards entry to Part 5? It does not enter through the initial definition of fire insurance in Regulation 337, which says that "'fire insurance' means insurance against loss of or damage to the property insured caused by fire, lightning, smoke or explosion due to ignition, and includes sprinkler leakage insurance". The only point of entry for an all-risks policy is the 1938 clause, not found in any other province's legislation, that says Part 5 applies "whether or not a contract includes insurance against other risks as well as the risks included in" the definition of fire insurance. As noted above, it seems unlikely this phrase was intended to embrace modern multi-peril policies. However, even if the phrase is thus extended, it fits ill with s. 119's class-based structure, as becomes apparent when we come to the specific exclusions. The question is simple to put but difficult to answer: If the 1938 phrase brings modern multi-peril policies into Part 5, how much of them is then taken out by the exceptions?

13 Much ink has been spilled on the interpretation of these exceptions and what precisely they remove from Part 5. Sadly, little certainty has emerged. The debate reveals different levels of uncertainty. The first uncertainty is whether one element of a policy falling within an exclusion removes the entire policy from Part 5, or only removes the excluded element. Different courts have answered the question differently. Before us, all parties agreed that an approach that chops the policy up, with some elements in Part 5 and other elements outside, is unworkable. This leaves, however, the anomaly that a minor excluded element can propel an entire policy out of Part 5.

14 The second level of uncertainty relates to how one interprets the exclusions in s. 119. One approach is to read them as referring to the nature of the loss or peril that actually occurs. Thus, if the event that triggers the claim is theft, an all-risks policy is removed from Part 5 by the operation of s. 119 (a), which excludes theft insurance. This approach seems unworkable, since what rules govern a policy depends on one's *ex post* characterization of the triggering event. Another approach is to hold that if the non-fire aspects of the coverage are merely incidental, the policy stays within Part 5; if they are more dominant, the policy is removed from Part 5 and comes under Part 2. This approach requires ranking

the perils covered in an all-risks policy to determine which are primary and which are incidental. This, in turn, has spawned a third view: that in a multi-peril policy, all risks covered are incidental to the coverage provided, with the result that all multi-peril policies are propelled out of Part 5 and into Part 2: *Dressew*, *supra*. Yet, detractors point out that this seems to change the common meaning of the word "incidental", which connotes a primary-secondary distinction, and that if there is no hierarchy of perils, they should all be considered co-equal, rather than "incidental" under s. 119(c).

15 Still other problems emerge when we try to force comprehensive policies into s. 119. Some losses covered by comprehensive policies, such as business losses, may be difficult to assess within the limitation period of one year from the date of the precipitating event, in this case fire. Further confusion arises from the fact that some of the enumerated exclusions seem to be internally inconsistent with the general grant. For example, fire insurance is defined in the regulations as including the risk of sprinkler leakage. Yet, s. 119(a) specifically excludes sprinkler leakage insurance from the Fire Insurance Part. How this can be so remains a mystery.

16 None of the proposed solutions for deciding whether or not a given multi-peril policy comes under Part 5 sits comfortably with the language of s. 119, taken in its entirety. One is driven to conclude that s. 119, despite its alterations, is based on the paradigm of discrete categories of insurance policies and is incapable of coherently addressing the modern multi-peril policy. It may have made good sense in the 1930s, when insurance was offered in discrete packages, each containing its own special type of coverage. It makes much less sense now.

17 The exclusions in s. 119 refer not to perils but to types of policies, as defined by current Regulation 337. Each of the items in s. 119(a) refers to a type of insurance defined in the Regulation. They are labeled variously, some by the class of property they cover (aircraft, automobile, boiler and machinery, plate glass); others by the activity involved (inland transportation, marine); still others by the peril (sprinkler leakage, theft). They share only this: they designate a category of insurance. Thus, s. 119(a) excludes from Part 5 policies of insurance that are not, by custom and statutory definition, fire insurance. Sections 119(b) and 119(d) likewise remove from Part 5 subject classes of insurance policies. Section 119(c) acts as a residual clause; it excludes policies not specified in (a), (b), and now (d), where fire insurance is minor or incidental in relation to the main subject of the policy. Viewed thus, all the parts of s. 119 work together.

18 If we still lived in a world where people took out different policies for each of these risks, s. 119 would still function reasonably well. The problem is that our world is quite different. Section 119 is being asked to apply to an animal it was never designed to tame — the modern multi-peril policy. Section 119 is built on the premise of discrete policies for discrete subject matters, with limited overlap. It deals with overlap and intersection by enumerated exclusions, and by the logic of what is primary and what is incidental. It may still make good sense for certain multiple subject-matter policies, where these are fairly limited in scope, and where the subject matters can be readily identified and ranked. But when applied to broader multi-risk policies, it fails.

19 I conclude that s. 119 can be applied to comprehensive policies only at the costs of contrived reinterpretation and anomalous consequences. Whatever interpretation one seeks to put on Part 5's terms, however one struggles to apply it to this policy, one ends by acknowledging inconsistency. I cannot conclude either from the language of s. 119 or its history that the Legislature intended a multi-risk policy such as this one to fall within Part 5 with all the attendant consequences, including a shortened limitation period. It follows that this policy, like any other policy that does not fit into a specific category, is governed by Part 2, the section of general application.

20 We come to this conclusion fully aware that the general provisions of Part 2 may not represent an ideal solution for multi-risk comprehensive policies. Professor Rendall has observed that "[i]t may well be thought that Pt. 2 is a more primitive regulatory code than Pt. 6 [now Part 5], less adequate as a scheme of regulation": J. A. Rendall, "Case Comment: *Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.*: A Revisitation" (1995), 28 C.C.L.I. (2d) 220, at p. 235. On the other hand, in *Churchland v. Gore Mutual Insurance Co.* (2001), 92 B.C.L.R. (3d) 1, 2001 BCCA 470, Finch J.A. commented that Part 5, on balance, is "unfavourable to insureds" (para. 61). To repeat, it is our hope that legislators will rectify the situation by amending the *Insurance Act* to provide specifically for comprehensive policies. In an insurance era dominated by comprehensive policies, it is imperative that Canada's Insurance Acts specifically and unambiguously address how these statutes are to operate and the rules by which comprehensive policies are to be governed.

21 This leaves the insurer's alternative argument that even if Part 2 applies, the fact that the contract of insurance specifies a limitation period of one year from loss ousts the longer limitation period in Part 2. I cannot accept this argument. The issue is governed by s. 3(a) of the Act, which provides:

> This Part has effect, despite any law or contract to the contrary, except that
>
> (a) if any section or statutory condition contained in Part 3, 4, 5, 6 or 7 is applicable and deals with a subject matter that is the same as or similar to any subject matter dealt with by this Part, this Part does not apply . . . .

This provision does not permit the insurer to substitute harsher terms than those provided in Part 2. The plain language of the section indicates the Legislature's intent that the provisions in Part 2 operate as a floor of protection beneath which insurance contracts cannot descend. If a contract falls within one of the enumerated Parts, then that Part is engaged and provides a different floor. Otherwise, the insured is guaranteed, at a minimum, the statutory protections contained in Part 2. The insurer's attempt to argue

that the shorter limitation period is more advantageous to the insured because it is more certain verges on the disingenuous.

III. Conclusion

22 I would allow the appeal and direct that the claim proceed to trial. The appellant shall have its costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Armstrong & Company, Vancouver.

Solicitors for the respondents: Guild, Yule & Company, Vancouver.